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IN THE COURT OF APPEALS OF INDIANA

JDS REAL ESTATE SERVICE, LLC and JIM D. SCHENK, II,	)	
Appellants-Intervenors,	)	
vs.	)	No. 20A05-0802-CV-72
THE BANK OF NEW YORK TRUST COMPANY N.A. as SUCCESSOR TO JP MORGAN CHASE BANK N.A. as TRUSTEE,	)	
Appellee-Plaintiff,	)	
and	)	
JEFFREY J. GEISLER, MARYANNE GEISLER, K C HILITES, INC., DEUTSCHE BANK TRUST COMPANY AMERCAS, as Custodian, JT BLEDSOE, GUS GOLDSMITH, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC., as NOMINEE FOR 1ST MARINER BANK, SCOTT T. CHAPMAN, SHEILA CHAPMAN,	)	
Appellees-Defendants.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT

The Honorable Evan S. Roberts, Judge
Cause Nos. 20D01-0612-MF-219

October 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

JDS Real Estate Service, LLC and Jim D. Schenk II, as intervening parties ("Intervenors"), appeal the trial court's grant of a motion to set aside a sheriff's sale filed by the The Bank of New York Trust Company N.A., as successor to JP Morgan Chase Bank N.A. ("Bank of NY"). Intervenors raise several issues that we consolidate as one: whether the trial court erred in granting the motion to set aside. Concluding that the Intervenors' appeal is untimely, however, we dismiss.

Facts and Procedural History

Bank of NY held a mortgage on property located at 1919 Greenleaf Boulevard in Elkhart, Indiana, securing a promissory note signed by Jeffrey Geisler. Geisler defaulted on the note and Bank of NY was awarded an in rem judgment in the amount of $881,573.97 plus interest. The trial court also entered a decree of foreclosure and ordered the Greenleaf Boulevard property to be sold at a sheriff's sale set for June 27, 2007. Schenk, on behalf of JDS Real Estate Service, was the only bidder for the Greenleaf Boulevard property with a

winning bid of $150,000. The same day, Bank of NY filed an emergency motion to vacate and set aside the sheriff's sale. The Sheriff notified Schenk when he tendered payment for the property that Bank of NY was seeking a court order to set aside the sale and refused to accept payment. The trial court granted Bank of NY's motion without holding a hearing.

On July 10, 2007, Intervenors filed a motion to intervene and a motion to reconsider. The motion to reconsider asked the trial court to set aside its June 27, 2007, order and set a hearing on Bank of NY's motion to set aside the sheriff's sale pursuant to Trial Rule 60(D), which states that in passing upon a Trial Rule 60(B) motion, "the court shall hear any pertinent evidence . . . ." The parties appeared in court for a status conference on July 12, 2007, at which the trial court granted the Intervenors motion to intervene and took the motion to reconsider under advisement, pending the following briefing schedule: Intervenors were given until August 13, 2007, to file a brief supporting their position and Bank of NY was given until September 14, 2007, to file a response.

After the parties filed their respective briefs, the trial court on September 25, 2007, denied the Intervenors' motion to reconsider and confirmed its June 27, 2007, order vacating and setting aside the sheriff's sale. The trial court gave Intervenors "thirty (30) days from the date of this Order to file the requisite pleadings with the Court and, absent said filing, the Court will permit [Bank of NY] to request that the Sheriff of Elkhart County sell said property at the Sheriff's sale." Appellants' Appendix at 141. On October 12, 2007, Intervenors filed a motion to correct error. On November 21, 2007, the trial court entered the following order on Intervenors' motion:

[T]he Court is willing to give the Intervenors their day in court to present

> credible evidence that indeed justice and equity require the Court to order the Sheriff to deliver a deed transferring the property to Intervenors upon their tendering of their bid price to the Sheriff of Elkhart County in the form of a cashier's check. Upon motion by the Intervenors filed within the next ten (10) days, the Court will GRANT the motion and set an evidentiary hearing on Intervenors' Motion to Reconsider filed on July 10, 2007. Absent this motion being filed, however, the Court shall enter an Order DENYING the Motion to Correct Errors.
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> Finally, the Court puts all parties on notice that pursuant to Trial Rule 53.3(D) the Court extends the period in which it has to rule on Intervenors' Motion to Correct Errors by an additional thirty (30) days to give all interested parties time to file briefs in opposition, should the Intervenors motion [sic] for an evidentiary hearing. To be clear, however, absent Intervenors requesting a hearing, the Court shall rule on the motion after the close of the ten (10) days in a manner consistent with this Order.

Id. at 153.

On November 27, 2007, Intervenors filed their request for a trial. The trial court, in accordance with its November 21, 2007, order, granted Intervenors' motion to correct error and set the matter for an evidentiary hearing. Following the evidentiary hearing, the trial court entered an order on January 14, 2008, once again denying Intervenors' motion to reconsider and motion to correct error, reinstating the June 27, 2007, order setting aside the sheriff's sale, and ordering Bank of NY to file the appropriate documents to undertake a new sheriff's sale of the property. On February 6, 2008, Intervenors filed their notice of appeal.

Discussion and Decision

By Intervenors' own characterization of the proceedings in the trial court, Bank of NY's motion to set aside was in substance a Trial Rule 60(B) motion for relief from judgment. See Appellants' Brief at 17-18 (discussing standard of review for Trial Rule 60(B) determinations). Trial Rule 60(C) provides that "[a] ruling or order of the court denying or granting relief, in whole or in part, by motion under subdivision (B) of this rule shall be

deemed a final judgment, and an appeal may be taken therefrom as in the case of a judgment."

Following the trial court's June 27, 2007, order on Bank of NY's "motion to set aside," Intervenors filed a motion styled a "motion to reconsider." A party can only file a motion to reconsider if the action has not yet proceeded to judgment; if the trial court has issued a final judgment, the party must file a motion to correct error. Citizens Indus. Group v. Heartland Gas Pipeline, LLC, 856 N.E.2d 734, 737 (Ind. Ct. App. 2006), trans. denied. Because a ruling on a Trial Rule 60(B) motion is a final judgment, we will consider Intervenors' motion requesting the trial court to revisit its final judgment to be a motion to correct error.[1] See Hubbard v. Hubbard, 690 N.E.2d 1219, 1221 (Ind. Ct. App. 1998).

Trial Rule 53.3(A) provides:

> In the event a court fails for forty-five (45) days to set a Motion to Correct Error for hearing, or fails to rule on a Motion to Correct Error within thirty (30) days after it was heard or forty-five (45) days after it was filed, if no hearing is required, the pending Motion to Correct Error shall be deemed denied. Any appeal shall be initiated by filing the notice of appeal under Appellate Rule 9(A) within thirty (30) days after the Motion to Correct Error is deemed denied.

The trial court may extend the time limitation for ruling for a period of no more than thirty days by filing an entry in writing before the expiration of the initial time period for ruling advising all parties of the extension. T.R. 53.3(D). Any additional extension may be granted

[1] Even if we considered the motion to be a true motion to reconsider, the result would be the same. A motion to reconsider does not extend the time period for filing a notice of appeal. Ind. Trial Rule 53.4(A) ("Such a motion by any party . . . shall not . . . extend the time for any further required or permitted action, motion, or proceedings under these rules."); Strate v. Strate, 149 Ind. App. 32, 34, 269 N.E.2d 568, 569 (1971) ("It has long been held that the time for appeal is not extended by . . . motions to reconsider."). To be timely under these circumstances, Intervenors' notice of appeal would have to have been filed within thirty days from the trial court's June 27, 2007, order.

only upon application to the Indiana Supreme Court. Id.

Intervenors' motion to correct error was filed on July 10, 2007. Although the trial court held a status hearing and outlined a briefing schedule regarding Intervenors' motion, the briefing schedule does not comply with the time limitations of Trial Rule 59 concerning motions to correct error,[2] and nothing in the Trial Rules grants the trial court the discretion to alter those time limitations. The trial court also did not properly extend the time limitation for ruling on Intervenors' motion to correct error: the trial court did not file an entry in writing extending its thirty days in which to rule by an additional thirty days; and even if it had done so, its ruling was entered more than sixty days after the motion was filed. In sum, Intervenors' notice of appeal, filed more than seven months after the final judgment, was untimely.

Intervenors contend that Bank of NY waived the timeliness issue by failing to raise it until its Appellee's Brief.[3] However, the timely filing of a notice of appeal is a jurisdictional prerequisite.[4] See App. R. 9(A)(5) ("Unless the Notice of Appeal is timely filed, the right to

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[2] Trial Rule 59 provides that a motion to correct error shall be filed not later than thirty days after entry of a final judgment. T.R. 59(C). The party opposing the motion may file a statement in opposition not more than fifteen days thereafter. T.R. 59(E). Here, the trial court purported to give Intervenors thirty days after filing their motion in which to submit a brief in support, and Bank of NY thirty days thereafter to respond.

[3] Intervenors also claim Bank of NY waived the timeliness issue by requesting an extension of time in which to file its Appellee's Brief, citing former Appellate Rule 14 and case law relevant thereto. As Intervenors acknowledge, however, the current appellate rules do not have a provision corresponding to former Appellate Rule 14 requiring a motion for extension of time to show that all motions to dismiss and other dilatory motions on behalf of the petitioner have been filed. As Intervenors also acknowledge, current Appellate Rule 35 provides that an appellee "may at any time file a motion to dismiss an appeal for any reason provided by law, including lack of jurisdiction." We therefore decline to address this particular point further.

[4] Although there is a body of case law suggesting that appellate courts may exercise their inherent

appeal shall be forfeited"); see also Marlett v. State, 878 N.E.2d 860, 864 (Ind. Ct. App. 2007) ("This court lacks subject matter jurisdiction over cases that are not timely initiated."), trans. denied. "The lack of appellate jurisdiction can be raised at any time, and if the parties do not question subject matter jurisdiction, the appellate court may consider the issue sua sponte." Georgos v. Jackson, 790 N.E.2d 448, 451 (Ind. 2003).

Conclusion

Intervenors' notice of appeal was not timely filed following the entry of final judgment, and the appeal is therefore dismissed.

Dismissed.

NAJAM, J., and MAY, J., concur.

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authority to entertain appeals even where a party has failed to satisfy the prerequisites for appeal, see Hogan v. Review Bd. of Indiana Dep't of Employment and Training Servs., 635 N.E.2d 172, 174 (Ind. Ct. App. 1994); Lugar v. State ex rel. Lee, 270 Ind. 45, 46, 383 N.E.2d 287, 289 (1978), more recent case law and the explicit forfeiture provision of Appellate Rule 9 confirm the jurisdictional nature of a timely-filed notice of appeal, see Claywell v. Review Bd. of Indiana Dep't of Employment and Training Servs., 643 N.E.2d 330, 330-31 (Ind. 1994).